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IN THE

Supreme Court of the United States

October Term, 1958.

No. 147

IRENE HILL, Administratrix of the Estate of BENJAMIN HILL, Deceased,

Petitioner,

v.

WATERMAN STEAMSHIP CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958. No.

IRENE HILL, ADMINISTRATRIX OF THE ESTATE OF BENJAMIN HILL, DECEASED,

Petitioner

v.

WATERMAN STEAMSHIP CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Irene Hill, Administratrix of the Estate of Benjamin Hill, Deceased, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered on February 6, 1958, affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania, in the appeal docketed in the said Court of Appeals as No. 12,329.

OPINIONS OF THE COURTS BELOW.

The judgment of the District Court for the Eastern District of Pennsylvania is unreported, and is printed in Appellant's Appendix in the court below, p. 12a. The opinion of the Court of Appeals is reported at 251 F. 2d 655 (infra, pp. 15-16).[1]

1. Because the opinion below stated only that it follows two prior opinions, the pertinent section of the more recent, *Curtis v. Garcia*, 241 F. 2d 30, is also appended (infra, pp. 17-21).

JURISDICTION.

The judgment of the Court of Appeals was entered on February 6, 1958 (infra, p. 16). An order extending time to file petition for writ of certiorari to and including July 5, 1958 was granted by this court on March 17, 1958. The jurisdiction of this court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTION PRESENTED.

Where a longshoreman was killed as a result of a maritime tort aboard respondent's vessel in navigable waters of a state, is the state rule of contributory negligence a complete bar to an action for wrongful death, or does the maritime doctrine of comparative negligence apply?

STATEMENT OF THE CASE.

Petitioner's decedent, a longshoreman employed aboard respondent's vessel, S.S. "Yaka," in the navigable waters of Pennsylvania, was killed as result of a maritime tort, respondent's failure to provide a safe place to work. The jury found respondent negligent and decedent contributorily negligent to the extent of 40%. In the wrongful death action, damages were found in favor of petitioner, which, reduced by 40%, amounted to $27,000.00.

The trial judge set aside the verdict as reduced by the comparative negligence rule, and entered judgment for the defendant on the ground that the state rule of contributory negligence barred the wrongful death action completely.

The Court of Appeals affirmed that judgment of the trial judge.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Decision of the Court Below Conflicts With the Rulings of This Court as to the Supremacy of the Federal Maritime Law and Its Application of the Comparative Negligence Rule, and With the Decisions of the Courts of Appeals for the First and Second Circuits, Which Hold That in an Action for Wrongful Death Caused by Maritime Tort, the Comparative Negligence Rule of the Maritime Law Applies, to the Exclusion of the State Rule of Contributory Negligence.

The decision of the court below is based upon its prior holdings in *Curtis v. Garcia*, 241 F. 2d 30, and *Klingseisen v. Costanzo Transp. Co.*, 101 F. 2d 902. These decisions violate the precepts of this court, and conflict with the well-reasoned decisions of the First and Second Circuits, concerning the supremacy of the federal maritime law and the limitations upon state intrusion into substantive admiralty doctrine, even where a state statute may be applied in aid of the maritime law.

The cause of action herein was a maritime tort, subject in all aspects to the maritime law. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. Ed. 1208. This body of law is subject solely to federal control, and is the independent and supreme law of the United States. *Panama R. Co. v. Johnson*, 264 U. S. 375, 386, 68 L. Ed. 748, 752.

In its desire to do equity and complete justice, under varying circumstances and in different localities, in maritime causes of action, this court has given effect to specific local remedies where they may apply. But, such effect has been specifically limited to the extent where the local remedies do not conflict with matters upon which the general maritime law has itself spoken or provided. If applied, the local remedy becomes maritime in nature, and

a part of the maritime law. Thereafter, it must be enforced according to maritime rules and principles. The feature of the maritime law sought always to be maintained is that it must operate uniformly throughout the whole country. *The Lottawanna,* 21 Wall. 558, 22 L. Ed. 654; *The J. E. Rumbell,* 148 U. S. 1, 37 L. Ed. 345.

It was in accordance with this desire of the maritime law to do complete justice that this court has granted to maritime causes of action the state-created remedies for wrongful death. In *Just v. Chambers,* 312 U. S. 383, 388, 85 L. Ed. 903, 907, this court granted such a remedy, specifying, however, that the state law may be applied *only so far as it does not conflict with the characteristic features of the maritime law* and its uniformity and consistency. It was made clear that the borrowed rule or statute brings with it only so much effect as does not infringe upon maritime principles. For, the state provision, upon application in the maritime law, becomes itself a part of and supplement to that law, and subject to all of its principles and operative rules. *Panama R. Co. v. Johnson, supra,* U. S. at 388-9, L. Ed. at 753-4; *The Arizona v. Anelich,* 298 U. S. 110, 119-20, 80 L. Ed. 1075, 1089.

This rule applies to every aspect of the maritime cause of action where it enforces a state-created right or remedy. Thus, the exclusiveness of the admiralty jurisdiction prohibits a state rule from infringing upon the maritime principles concerning the measure of recovery of indemnity for personal injury. It being apparent that such would change a settled maritime law and destroy the required uniformity, such effect is prohibited. *Southern Pacific Co. v. Jensen,* 244 U. S. 205, 216, 61 L. Ed. 1086, 1098. "Under the doctrine . . . no state has power to abolish the well-recognized maritime rule concerning measure of recovery, and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law." *Chelen-*

tis v. Luckenbach S. S. Co., 247 U. S. 372, 382, 62 L. Ed. 1171, 1176.

The same principle also applies in maritime causes of action sounding in contract. In *The J. E. Rumbell*, 148 U. S. 1, 12, 17, 37 L. Ed. 345, 347, 349, this court applied, in a maritime cause of action, a lien right created by a state statute, but solely according to maritime rules of priority. In refusing to follow the priority set by the state creating the right, this court held that admiralty courts must enforce the state statute according to maritime rules, and that the decisions of the highest court of the state are immaterial. Similarly, see *Union Fish Co. v. Erickson*, 248 U. S. 308, 314, 63 L. Ed. 261, 263.

The Conflict with the Supreme Court: Pope & Talbot, Inc. v. Hawn, 346 U. S. 406.

The specific issue under consideration was reviewed by this court in *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 98 L. Ed. 143. The question of the application of the state bar of contributory negligence in a maritime cause of action was directly in issue. After observing that "the harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice", this court refused to apply that "discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight." (U. S. at 408-9, L. Ed. at 150-1.) See *The Max Morris*, 137 U. S. 1, 34 L. Ed. 586. The court continued (U. S. at 409, L. Ed. at 151):

> "(b) Nor can we agree that Hawn's rights must be determined by the law of Pennsylvania, under which, it is said, any contributory negligence would bar all recovery in this personal injury action. True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he

was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. *Consequently, the basis of Hawn's action is a maritime tort,* a type of action which the Constitution has placed under national power to control in 'its substantive as well as its procedural features. . . .' *Panama R. Co. v. Johnson,* 264 U. S. 375, 386, 68 L. Ed. 748, 752, 44 S. Ct. 391. And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. *Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling.* While states may sometimes *supplement* federal maritime policies, *a state may not deprive a person of any substantial admiralty rights* as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them. . . ." (Emphasis supplied)

This court thus made it clear that the right which was being enforced, the liability being adjudicated and the duty whose breach was complained of were rooted in the maritime law, and had to be determined in accordance therewith. That is, the right or cause of action was *the negligence or unseaworthiness,* which are maritime in nature as are all defenses thereto. Contributory negligence, thus, going to the *maritime right,* is applicable only according to maritime principles, *and its application must be the same, whether the victim survived or not.* For, this concept affects only the *wrong* committed and not the *result* of that wrong, or its *remedy,* or whether the victim survived.

This court has left no doubt that only a *remedy* created by the state can be borrowed, and not a *right.* The Judiciary Act of 1789, Sec. 9, now Judicial Code, 28 U. S. C. 1333, saves to suitors only common law "remedies".

Therefore, in *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 383-4, 62 L. Ed. 1171, 1176, this court said:

> "The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury . . . Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate *remedy*, recognized at common-law . . ." (Emphasis supplied.)

In recognizing the power of the maritime law to enforce a death claim by virtue of a state statute, this court has made it clear that the power arises in the "saving to suitors" clause, which relates only to *remedy*.[2] Just as in *Chelentis*, the plaintiff may not, in a "saving" case, choose to measure liability by common-law standards, neither can the defendant so measure plaintiff's contributory negligence.

The court below in the instant case, and in *Curtis v. Garcia*, 241 F. 2d 30, failed to apply the principles so expressed by this court. It failed to give heed to the precept that the right which is the cause of action is for unseaworthiness and negligence (and not the power or means to recover for personal injury or death); and that this right is rooted in maritime law. It ignored the recognition by this court that even if plaintiff "were seeking to enforce a state created remedy for this right, federal maritime law would be controlling." Further, the court below did not recognize that in enforcing state death statutes, this court has specified that it is only borrowing a *remedy*, and not a right; for the right already exists in maritime law, and the Judicial Code empowers the federal court only to use the state *remedy*.

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2. This court has maintained, also, that the presence or lack of power to sue for wrongful death is a question of survivorship of action and not of the existence of a substantive right or liability, and is a purely *remedial* concept. Just v. Chambers, 312 U. S. 383, 85 L. Ed. 903; Cox v. Roth, 348 U. S. 207, 99 L. Ed. 260.

Nevertheless, the court below insists that the right is not maritime, but was a creature of the state legislature.[3] In *Curtis*, the Court of Appeals stated (p. 35) that it recognized that the opposite opinion was expressed by the First Circuit in *O'Leary v. United States Lines Company*,[4] but stated its complete disagreement.

The Conflict With the Courts of Appeals for the First and Second Circuits.

The Courts of Appeals for the First and Second Circuits are in full conflict with the Third Circuit upon the meaning of the *Hawn* decision, and the effect of contributory negligence in a maritime death action.

In *O'Leary v. United States Lines Co.* (1 Cir.), 215 F. 2d 708 (cert. den. 348 U. S. 939, 99 L. Ed. 735), a maritime cause of action for wrongful death occurring in Massachusetts waters, the court said that the *Hawn* decision settled all prior doubts as to the supremacy of the general maritime law over the state law in all aspects where it has spoken; that this court left no doubt that in a diversity action for injury to or death of a shore worker in navigable waters of a state, although the state death act may provide a remedy, all rights, including the effect of the victim's own negligence, are to be determined by the general maritime law. Pointing out that this court said that "even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling", Judge Woodbury continued (p. 711):

> ". . . Indeed, in our opinion it would be incongruous to hold, in conformity with Pope & Talbot, Inc. v. Hawn, supra, that the maritime law determined the respective rights of the parties in the event of personal injuries short of death, but that state law determined their rights in the event of injuries resulting in the ultimate

3. It will later be shown that the Supreme Court of Pennsylvania disagrees with this application of the Pennsylvania statute.

4. Discussed infra.

consequence of death. And, it would be even more incongruous to hold that the husband's right of action, which the plaintiff here asserts in her count two under the local survival statute, is to be determined under the rule of Pope & Talbot by the maritime law, but that the right of action arising out of the same accident conferred directly upon her by the local death act is to be determined by local law. Furthermore, as the Supreme Court pointed out in Chelentis v. Luckenbach S. S. Co., . . . the saving clause reveals no intention that liability as well as remedy shall be determined by the common law rather than the maritime law, and to apply state substantive law to determine the rights of the parties would create divergence in a field where uniformity has long been considered important."

More recently, the Second Circuit expressed complete agreement with the First Circuit and specific disagreement with the Third Circuit, upon this point. In *Halecki, Admx., v. United N. Y. & N. J. S. H. P. Association*, 251 F. 2d 708, Judge Hand said that before the *Hawn* decision, some courts had held that where a state death statute was applied, the state's bar of contributory negligence was effective. As example, the court cited cases upon which the Third Circuit relied in deciding *Curtis v. Garcia*. However, the *Hawn* case settled the question in holding that contributory negligence was not a bar to a maritime action, but only limited the damages. The opinion continues at p. 713:

". . . . and this we read to mean that *rights arising from faults that occur in navigable waters are exclusively the creation of maritime law, and are exempt from the defense of contributory negligence* whether suit upon it is in the admiralty or in an action at law, state or federal." (Emphasis supplied.)

After quoting further from the *Hawn* opinion, the court held that the maritime death action was exempt from con-

tributory negligence as a bar. Judge Hand stated his agreement with the reasoning and interpretation by the First Circuit in the *O'Leary* case, and his disagreement with the *Curtis* decision of the Third Circuit.

The First, Second and Third Circuit Courts of Appeal concede the clear conflict that exists concerning this important aspect of the maritime law. Realizing the necessity for settlement of the issue, on June 9, 1958, this court granted certiorari in the *Halecki* case, where the question here at issue was presented. The irreconcilable conflict among the circuits, and the importance of the issue involved require a review by this court of the instant case.

II. In Subjecting the Action for Death by Maritime Tort to the Pennsylvania Contributory Negligence Bar, the Court Below Has Applied the Pennsylvania Death Statute in a Manner That Conflicts With the Interpretations by the Pennsylvania Supreme Court.

In holding that the Pennsylvania Wrongful Death Act[5] creates a right rather than a remedy, the Court of Appeals has decided an important state question in conflict with applicable state decisions, as well as with federal maritime decisions. The *Curtis* opinion is based upon the incorrect proposition that the Pennsylvania death statute raised a new right of action, as opposed to just affording a remedy for an already established right. By doing this, the court below arrived at the erroneous conclusion that the cause or right of action involved in the instant case is not rooted in the maritime law, but in the state statute, and on that basis, applied the state bar of contributory negligence.

The court below relied upon *Pezzulli v. D'Ambrosia*, 344 Pa. 643, at 647, 26 A. 2d 659, 661, where the Pennsylvania Supreme Court, discussing the Pennsylvania death act, had said:

> "This action '. . . represents a cause of action unknown to the common law.' . . ."

5. 12 Pa. Stat. Ann. 1601-4.

Therefore, the Court of Appeals held that the maritime law enforcing the statute is enforcing a right "rooted in state law."

In this application, the court below was misconstruing the language of the Pennsylvania Supreme Court. It is clear from a review of Pennsylvania decisions that the term "cause of action" was used to mean, not a legal right, but a *remedy*. Subsequent to *Pezzulli* and prior to the *Curtis* decision, the Pennsylvania Supreme Court, agreeing with the declaration by this court in the *Hawn* case, specifically stated that *the right of action arises in the negligent or wrongful act*, and the Pennsylvania Wrongful Death Act merely provided the remedy. Thus the words "cause of action" as referred to above, were intended to designate "remedy", and nothing more. In *Fisher v. Hill*, 368 Pa. 53, 81 A. 2d 860, plaintiff sued under the Pennsylvania death statute for damages for the death of a child, after having previously obtained a judgment under the same statute for his wife's death which had occurred in the same accident. The court held that since all claims under a single cause of action must be asserted in one suit, the second suit was barred by merger. The court said, 368 Pa. at 58-60:

> "While the *rights* of action conferred by these acts are sometimes referred to as *causes* of action, they really confer no more than rights to recover damages growing out of *a single cause of action, namely, the negligence of the defendant which caused the damages suffered.* The phrase 'cause of action' is not susceptible of any single definition to be applied in all types of cases. In Rooney v. Maczko, 315 Pa. 113, 117, 172 A. 151, this Court quoted with approval that portion of the opinion in U.S. v. Memphis Cotton Oil. Co., 288 U.S. 62, 67, 53 S. Ct. 278, where Mr. Justice Cardozo said: 'A "cause of action" may mean one thing for one purpose and something different for another. . . .

> At times and in certain contexts, it is identified with the infringement of a right or the violation of a duty. At other times and in other contexts, it is a concept of the law of remedies, the identity of the cause being then dependent on that of the form of action or the writ. Another aspect reveals it as something separate from writs and remedies, the group of operative facts out of which a grievance has developed.'
>
> "In Fields v. Philadelphia Rapid Transit Co., 273 Pa. 282, 117 A. 59, . . . This Court said at page 285: 'It, therefore, becomes necessary to determine what constitutes the cause of action in Pennsylvania.' Is it the violation of the duty which the defendant owes to exercise due care, or the damage which flows from the wrong? This court has defined it to be (Martin v. Pittsburgh Rys. Co., 227 Pa. 18), "*the negligent act* or acts which occasioned the injury." It "*is that which produces or effects* the results complained of": Noonan v. Pardee, 200 Pa. 474, 482. . . . *If the cause of action is the wrongful act, and we so hold, then all of the damages sustained thereby, whether to person or property,* are properly sought in one suit.'" (Emphasis supplied).

The court concluded that under the Pennsylvania Wrongful Death Act, as in tort law generally, the *cause of action is the negligent or wrongful act* of the defendant, and *not* the injury or death resulting therefrom. Similarly see *Simodejka v. Williams*, 360 Pa. 332, 62 A. 2d 17. Thus, it is the law of Pennsylvania, as expressed by its highest court, that in considering the wrongful death statute, reference to the substantive "right" or "cause" of action means the *violation of the duty*, and not the result thereof. The basic right or duty exists outside the statute, in the common law of negligence or, as here, in the maritime law.

This conclusion is not new in Pennsylvania, but has been repeatedly held where the specific problem has arisen.

In *Hill v. P.R.R.*, 178 Pa. 223, 35 Atl. 997, the court made it clear that whether the victim lives or dies, the cause or right of action is the same, but that "the remedy given to the widow by the (death act) was, of course, a new *remedy* which had no previous existence." (178 Pa. at 228.) Similarly, see *Hughes v. D. & H. Canal Co.*, 176 Pa. 254, 260, 35 Atl. 190.

The same question has also arisen in cases involving conflict of laws. In *Centofanti v. P.R.R.*, 244 Pa. 255, 261-2, 90 Atl. 558, the accident occurred in Pennsylvania, and the death in New Jersey. In determining the choice of law, the Supreme Court of Pennsylvania held that the cause of action was the tort, and not the death; that the "wrongful act . . . is 'unlawful violence or negligence' causing . . . death."

It is settled, therefore, that the Pennsylvania Wrongful Death Act creates no new cause or right of action, but provides a new *remedy*. Thus, in an action for damages for death caused by a maritime tort, the cause of action is the wrong committed, the negligence or unseaworthiness. A state-created *right* is not involved, and the maritime law is paramount. Under such circumstances, the state bar of contributory negligence is inapplicable.

It is submitted that in *Curtis v. Garcia*, and in the instant case relying thereon, the Court of Appeals for the Third Circuit misconstrued the Pennsylvania death statute, and, as a result thereof, improperly injected into a maritime right of action a state-created principle of liability, contrary not only to the federal law, but also to the decisions of the state itself.

Upon this ground alone, certiorari should be granted and the judgment reversed.

CONCLUSION.

The decision of the court below and those upon which it was based are in direct conflict with the principles of federal maritime law announced by this court. In this disagreement, the court below conflicts also with the decisions of the First and Second Circuits upon the specific point at issue. Further, in imposing upon the federal maritime law a substantive rule of Pennsylvania, the court below interpreted the Pennsylvania death act in a manner conflicting with the decisions of the Supreme Court of Pennsylvania.

These irreconcilable conflicts directly involve issues of national importance, and inhibit the uniform application of the federal maritime law in a situation that regularly arises throughout the nation. This court has recently granted certiorari in *Halecki, Admx., v. United N.Y. & N.J. S.H.P. Asso.*, where the instant issue is among those presented.

It is therefore respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
MILTON M. BOROWSKY,
MARTIN J. VIGDERMAN,
Counsel for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,329

IRENE HILL, ADMINISTRATRIX OF THE ESTATE OF BENJAMIN HILL, DECEASED,
Appellant

v.

WATERMAN STEAMSHIP CORPORATION.

Appeal from the United States District Court for the Eastern District of Pennsylvania.

Argued January 9, 1958

Before Maris, McLaughlin and Hastie, *Circuit Judges.*

OPINION OF THE COURT

(Filed February 6, 1958)

PER CURIAM.

This case is squarely ruled against the appellant by our prior decisions in Klingseisen v. Costanzo Transp. Co., 1939, 101 F. 2d 902, and Curtis v. A. Garcia y Cia., 1957, 241 F. 2d 30. We are, however, urged by the appellant to overrule those cases and now hold that the admiralty doctrine of comparative negligence is to be applied in a suit under the Pennsylvania Wrongful Death Act

for the death of a longshoreman on board a vessel in the port of Philadelphia instead of the Pennsylvania contributory negligence rule. We are satisfied, however, that the cases cited were correctly decided and we will accordingly follow and apply the rule laid down in them.

The judgment of the district court will be affirmed.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest;

Ida O. Creskoff
Clerk

February 6, 1958.

MARGARET JEAN CURTIS, ADMINISTRATRIX D. B. N. OF THE ESTATE OF WILLIAM THOMAS, DECEASED, APPELLANT,

v.

A. GARCIA Y CIA., LTDA. (two cases).

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT.

Argued Dec. 7, 1956.

Decided Jan. 21, 1957.

Rehearing Denied March 7, 1957.

Before Biggs, Chief Judge, Kalodner, Circuit Judge, and Kraft, District Judge.

Kraft, District Judge.

* * *

Appeals 11,993 and 11,994.

The two claims embraced in the action of the administratrix of Thomas' estate are based on separate Pennsylvania statutes: one upon the wrongful death statute [5] and the other upon the survival statute.[6] The administratrix challenges the district court's denial of recovery on the former, while Garcia disputes that court's allowance of recovery on the latter. The question thus posed is whether the federal maritime law or the substantive law of Pennsylvania governs each of this plaintiff's two claims.

Under the general maritime law there is no right of recovery of damages for death resulting from a maritime tort. In Klingseisen v. Costanzo Transp. Co., 3 Cir., 1939,

5. Act of April 15, 1851, P. L. 669, § 19, 12 P. S. § 1601. Act of April 26, 1855, P. L. 309, § 1, Act of June 7, 1911, P. L. 678, § 1, Act of April 1, 1937, P. L. 196, § 1, 12 P. S. § 1602.

6. Act of April 18, 1949, P. L. 512, art. VI, §§ 601, 603, 20 P. S. §§ 320.601, 320.603.

101 F. 2d 902, the appellant's claim was based on the same wrongful death statute upon which the present plaintiff relies for one of her claims. We there held that, while jurisdiction existed because of that statute, the right to maintain the suit could be enforced in admiralty only in accordance with the substantive law of Pennsylvania, which barred recovery on the ground of the decedent's contributory negligence. In the H. S. Inc., No. 72, 3 Cir., 1942, 130 F. 2d 341, adhering to our decision in Klingseisen, we held that the rights of the parties were controlled by the substantive law of New Jersey.

Contributory negligence of the deceased is established in the present case. The administratrix urges, therefore, that both her claims should be resolved under the humane comparative negligence doctrine of maritime law, while Garcia contends that both claims should be governed by substantive state law, which bars recovery.

Had Thomas survived, his right of action arising from this alleged maritime tort would have been determined under maritime law. Pope & Talbot, Inc. v. Hawn, 1953, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143. However, we do not construe certain of the language[7] in that case, as does O'Leary v. United States Lines Company, 1 Cir., 1954, 215 F. 2d 708, to mean that the principles of general maritime law are to be applied when jurisdiction is invoked to enforce a right created by a state wrongful death statute.

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7. 346 U. S. 406, at pages 409, 410, 74 S. Ct. at page 205: "True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, a type of action which the Constitution has placed under national power to control in its substantive as well as its procedural features * * *' Panama R. Co. v. Johnson, 264 U. S. 375, 386, 44 S. Ct. 391, 393, 68 L. Ed. 748. And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state-created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court." (Footnotes omitted.)

Hawn had a right of action, independent of any Pennsylvania law, because his injury resulted from a maritime tort and was not fatal. Here, the injuries were fatal and neither the administratrix nor those for whose benefit her claim under the wrongful death statute is asserted had any right of action, under maritime law, to recover damages for the decedent's death, even though it resulted from a maritime tort. She did not seek to enforce any maritime right by a state created remedy.

No right of action existed in Pennsylvania, in or on behalf of the next of kin of a decedent whose death resulted from a tortious act, prior to the enactment of this wrongful death statute. That this statute created a new right of action, not for the injury to the deceased, but for the injury to those who suffered loss by reason of the death, is clear from the language of the Pennsylvania Supreme Court in Pezzulli v. D'Ambrosia, 1942, 344 Pa. 643, at page 647, 26 A. 2d 659, at page 661:

> This action "* * * represents a cause of action unknown to the common law and is for the benefit of certain enumerated relatives of the person killed by another's negligence; the damages recoverable are measured by the pecuniary loss occasioned to *them* through deprivation of the part of the earnings of the deceased which they would have received from him had he lived." (Footnotes omitted.)

It is significant that Justice Black, who delivered the opinions both in Pope & Talbot, Inc. v. Hawn, supra, and in Garrett v. Moore-McCormack Co., Inc., 1942, 317 U. S. 239, at page 245, 63 S. Ct. 246, at page 251, 87 L. Ed. 239, said, in the latter case:

> "The constant objective of legislation and jurisprudence is to assure litigants full protection *for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates.* Not so long ago we sought to achieve this result with re-

spect to enforcement in the federal courts of rights created or governed by state law. *And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State.*" (Emphasis supplied; footnotes omitted).

The test is whether the right is one rooted in the general maritime law or one rooted in the state law. When the origin of the right has been determined, the court, federal or state, must apply the law of that jurisdiction in which that right originated. This plaintiff, in seeking recovery under the wrongful death statute, undertakes the enforcement of a right which is neither rooted in nor recognized by the maritime or the common law, but is wholly state created. There was sufficient evidence to submit to the jury the issue of the decedent's contributory negligence and the district court correctly decided that the plaintiff's claim, which was based on the Pennsylvania wrongful death statute, was governed by the law of that state and was therefore barred by the decedent's contributory negligence.

The plaintiff's claim under the survival statute rests on a different foundation. In Pezzulli v. D'Ambrosia, *supra;* the Pennsylvania Supreme Court, referring to an action under the survival statute, said:

> This "* * * is not a new cause of action at all, but merely continues in his personal representative the right of action which accrued to the deceased at common law because of the tort; the damages recoverable are measured by the pecuniary loss occasioned to *him*, and therefore to *his estate*, by the negligent act which caused his death."

In the present case, under maritime law, death abated the right of action which accrued to Thomas thereunder

for the injury he suffered in this maritime accident. The effect of the state statute is merely to preserve Thomas' right of action and to continue it, unabated, in his administratrix. No new right is created. An existing right is preserved and a remedy afforded for its enforcement. Since the right preserved here is one rooted in maritime law, the district court properly applied the maritime rule of comparative negligence under which the decedent's contributory negligence was no bar to plaintiff's claim under the survival statute.

The judgments of the district court will be affirmed.

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IN THE

Supreme Court of the United States

October Term, 1958.

No. 147.

IRENE HILL, Administratrix of the Estate of BENJAMIN HILL, Deceased,

Petitioner,

v.

WATERMAN STEAMSHIP CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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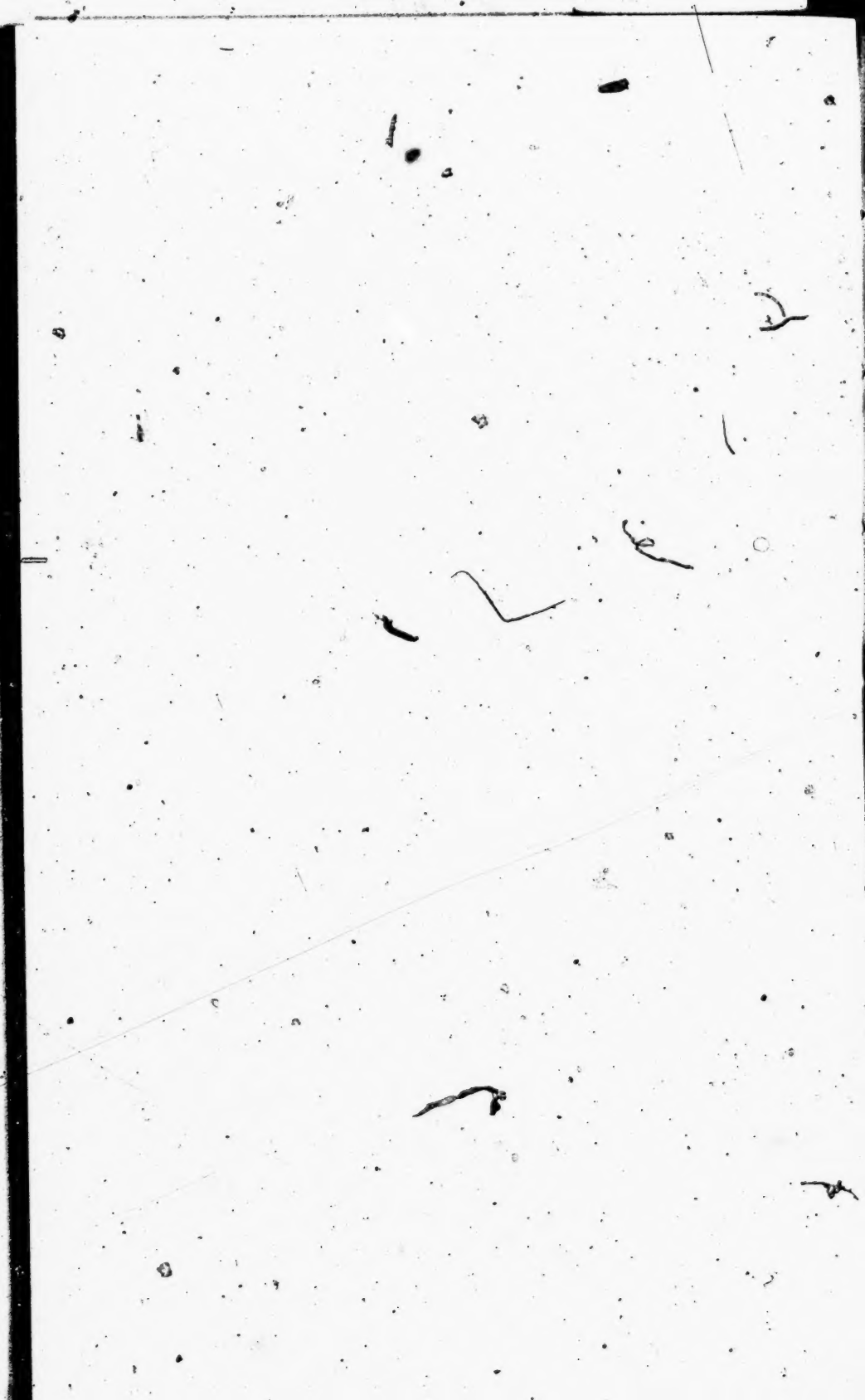

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958.

No. 147.

IRENE HILL, ADMINISTRATRIX OF THE ESTATE OF BENJAMIN HILL, DECEASED,

Petitioner,

v.

WATERMAN STEAMSHIP CORPORATION,

Respondent.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The unreported judgment of the District Court for the Eastern District of Pennsylvania appears in petitioner's appendix in the court below at page 12a. The opinion of the United States Court of Appeals for the Third Circuit is reported at 251 F. 2d 655, and is printed at pages 15 and 16 of the appendix annexed to the petition.

JURISDICTION.

The jurisdiction of this court to review the final judgment of the United States Court of Appeals for the Third Circuit is provided by Sections 1254(1) and 2101(c) of Title 28, U. S. Code.

QUESTION PRESENTED

Where a longshoreman is killed as a result of a maritime tort involving his own contributory negligence aboard respondent's vessel in navigable waters of a state, does not the substantive law of the state which bars recovery in event of the decedent's contributory negligence apply to the action brought by his widow solely upon the authority of the state-created wrongful death statute?

STATEMENT OF THE CASE.

Petitioner recovered substantial damages as personal representative of the estate of the decedent, a longshoreman who was fatally injured in an accident determined by the jury to have resulted partly from the respondent's failure to furnish him with a safe place to work and partly through his own contributory negligence, which they found amounted to 40%. Petitioner's recovery under the Pennsylvania Survival Act, reduced by the proportion of decedent's contributory negligence, was not disturbed by the courts below, and has been paid by the respondent.

The trial judge set aside petitioner's award arising from her cause of action under the Pennsylvania Death Act (Act of April 15, 1851, P. L. 674, 12 Purdon's Statutes, Section 1601, as amended by the Act of April 26, 1855, P. L. 309, 12 Purdon's Statutes, Section 1602), on the ground that this cause of action was a state-created right, not rooted in the federal maritime law and subject to the substantive law of Pennsylvania under which contributory negligence of the decedent operates as a bar to recovery of damages. This judgment was affirmed by the United States Court of Appeals.

ARGUMENT.

I. No Conflict Exists Between the Decision of the Court Below and the Prior Decisions of This Court, Which Have Consistently Followed the Rule That Admiralty Courts, When Invoked to Protect Rights Rooted in State Law, Apply the Substantive Law of the State.

The petitioner is asking this court to repudiate the rule established by *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938) that causes of action based on state law must be interpreted in the federal courts according to the prevailing substantive law of the state. Referring to the *Erie* case, this court in *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 245 (1942) expressly included admiralty proceedings within the scope of that doctrine:

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State."

In *Western Fuel Co. v. Garcia*, 257 U. S. 233, 242 (1921), the court said:

> "As the logical result of prior decisions we think it follows that, where death upon such waters results from a maritime tort committed on navigable waters *within a State whose statutes give a right of action on account of death by wrongful act*, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given. The subject is maritime and local in character and the speci-

fied modification of or supplement to the rule applied in admiralty courts, *when following the common law*, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. Southern Pacific Co. v. Jensen, 244 U. S. 205." (emphasis added).

A Delaware statute allowing the widow or personal representative of a decedent to recover damages for the wrongful death of a person killed on a vessel owned by a Delaware corporation was held to be enforcible in admiralty, applying the "full benefits of the statute" in granting relief. *The Hamilton*, 207 U. S. 398 (1907).

It has been expressly decided that no suit for wrongful death would lie "in the courts of the United States under the general maritime law." *The Harrisburg*, 119 U. S. 199, 213 (1886); *The Corsair*, 145 U. S. 335, 344 (1891); *Just v. Chambers*, 312 U. S. 383, 388 (1940). In order to obtain such benefits, the state law must be invoked and the substantive law of the state must be accepted in applying these state-created rights. *Levinson v. Deupree*, 345 U. S. 648, 651 (1953). So far as petitioner's action for wrongful death is concerned, her rights are clearly "rooted in state law" rather than in admiralty. The decision of the court below is entirely consistent with the pertinent decisions of this court.

Petitioner seeks review on the additional ground that there is a conflict of opinion between the Third Circuit and the First and Second Circuits on this issue. See *O'Leary v. United States Lines Co.*, 215 F. 2d 708 (1954), and *Halecki v. United New York & New Jersey S. H. P. Ass'n.*, 251 F. 2d 708 (1958), certiorari granted and presently pending. Both of these cited decisions rely on the proposition that *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406 (1953), holding that the rights of a maritime worker *injured* on a vessel within the navigable waters of Pennsylvania were controlled

by the general maritime law, including the rule of comparative negligence in determining his damages, suggested the need for similar modification of prior law in applying wrongful death statutes. This disagrees with prior decisions in the Fifth Circuit: *Graham v. A. Lusi, Ltd.*, 206 F. 2d 223 (CA5, 1953), *Hartford Accident & Indemnity Company v. Gulf Refining Company*, 230 F. 2d 346 (CA5, 1955), and in the Sixth Circuit: *Lee v. Pure Oil Company*, 218 F. 2d 711 (CA6, 1955). The Third Circuit followed its own recent decision in *Curtis, Admr. v. Garcia*, 241 F. 2d 30, 36 (C. A. 3, 1957), recognizing the distinction between state "survival" acts which preserve to a personal representative the decedent's personal maritime cause of action, and state "death" acts which create new and different rights of action non-maritime in character.

In *Halecki, supra*, the Second Circuit agreed with dictum in *O'Leary*, supra, which in turn was based on an assumption derived from dictum in *Hawn, supra*, that it would be "incongruous" to hold in conformity with *Hawn* that damages for injuries "short of death" were measured by maritime law, but that substantive state law determined the rights of the parties "in the ultimate consequence of death." This conclusion is correct if limited to the decedent's own right of action, whether he asserts it while alive as in *Hawn* or by his personal representative after death as in *O'Leary*. In that situation, his maritime cause of action passes to his personal representative. The state created the remedy, but not the right.

Although both *O'Leary* and *Halecki* conceded that recovery under wrongful death statutes would have been governed by substantive state law prior to the *Hawn* decision, they assume that the law has been altered by the dictum in *Hawn* that "even if Hawn were seeking to enforce a state created *remedy* for this *right*, federal maritime law would be controlling." (emphasis added). The fact that the right of action extended to shore workers under *Hawn* is an extension of the seaman's right under general mari-

time law, whereas the widow's right of action to recover for the wrongful death did not exist in general maritime law or at common law, is completely ignored.

Mere incongruity in result cannot outweigh the difference in the derivation of these rights; for that matter, it would be more incongruous to repudiate the doctrine of *Erie R. Co. v. Tompkins, supra,* in a situation where it clearly applies. Since the First and Second Circuits have incorrectly used *Pope & Talbot, Inc. v. Hawn, supra,* as the basis for judicial legislation not justified by any language of that decision, on an entirely separate issue, and in disregard of the established policy of this court to apply substantive state law to rights created or governed by state law, even in admiralty, their conflict of opinion with the Third, Fifth and Sixth Circuits is not sufficient to justify review by this court. Certiorari has been granted in *United New York, et al. v. Halecki,* to review the decision of the Second Circuit applying the comparative negligence principle in an admiralty suit brought under the Wrongful Death Act of New Jersey, as one of several questions presented. Others involve the extension of the seaworthiness warranty to a shoreside electrician working for a subcontractor while the vessel is in drydock, and the scope of the jury's right to draw inferences in the complete absence of probative facts. Thus, the only question involved in the present petition is already before this court in conjunction with more substantial issues.

II. The Pennsylvania Death Act Created a New Cause of Action, Rather Than A Remedy For An Existing Cause of Action.

Respondent submits that there is no substance to the petitioner's contention that the Pennsylvania Death Act, *supra,* provided a new remedy rather than a new right or cause of action. This distinction is fundamental to the merits of the present petition in view of the following comment in *Pope & Talbot, Inc. v. Hawn, supra,* at page 409.

"His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling."

The Pennsylvania Death Act of 1851, 12 Purdon's Statutes, Section 1601, provides as follows:

"Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his life, the widow of such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned."

The amending Act of 1855, 12 Purdon's Statutes, Section 1602, removed the right of the personal representative to bring suit in such cases, and designated the "husband, widow, children, or parents" as the persons entitled to recover, and directed that the sum recovered should go to them in the proportion they would take the decedent's estate in case of intestacy.

The Act of 1851 and its 1855 amendment "created a new right of action." *Howard v. Bell Telephone Co.*, 306 Pa. 518 (1932). The court stated (at page 523):

"Therefore, while the right of action given by the statute to the widow is a new one, it is dependent upon the existence of a right of action in the husband at the time of his death. The statute cannot be construed to give the widow a greater right than the husband would have if living."

The court consequently held that the widow's right under the Death Act was barred because the statute of limitations had extinguished the husband's personal right of action. Similarly, the widow's right is barred by the

contributory negligence of the deceased, which would have barred his own recovery under Pennsylvania common law. *Hucaluk v. Clyde Realty Co., Inc.*, 378 Pa. 169 (1954); *Kasanotich v. George*, 348 Pa. 199 (1943); *Pickle v. Trimmel*, 93 F. Supp. 823, 825 (E. D. Pa., 1950); *Kaczorowski v. Kalkosinski*, 321 Pa. 438, 440 (1936); *Grant v. Phila. B. & W. R. R. Co.*, 215 Pa. 265 (1906).

The Pennsylvania statute is an adaption of Lord Campbell's Act in England, and is similarly construed. See *Kaczorowski v. Kalkosinski, supra*, at page 441, where the court noted that "actions for death were unknown at common law * * * and, *as the right to recover therefor is purely a creation of statute, we have frequently stated that it is a new cause of action*: P. R. R. Co. v. Zebe, 33 Pa. 318; Shambrach v. Middle Creek Elec. Co., 232 Pa. 641. It was intended to create a new right and to compensate for a loss independent of that suffered by the deceased. The distinction between it and the action which the deceased could have commenced is emphasized by the fact that there are different measures of damages for the two actions." (emphasis added).

This distinction is further emphasized by the subsequent ruling of the Pennsylvania Supreme Court that two different periods are to be applied for limitation of the actions, enforcing the statutory limit of one year upon wrongful death suits and allowing two years for actions under the "survival" statute. *Stegner v. Fenton*, 351 Pa. 292 (1945).

Potter Title & Trust Co. v. Petcoff, 122 Pa. Super. Ct. 540 (1936), holding that at common law there was no *right* in any one to recover damages for the death of another and that the common law rule was abrogated by the Acts of 1851 and 1855, stated (at page 544): "These acts altered the common law and created a new cause of action." See *Centofani v. Pennsylvania R. Co.*, 244 Pa. 255, 260 (1914); *Regan v. Davis*, 290 Pa. 167, 171 (1927); *Gaydos v. Domabyl*, 301 Pa. 523, 529 (1930).

In *Minkin v. Minkin*, 336 Pa. 49, 51 (1939), the court speaks of the Death Act as "creating a new right" for which the common law furnished no redress. In the leading case of *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 647 (1942), the Death Act is described as "a cause of action unknown to the common law." *Stegner v. Fenton, supra*, says that the statute "provided for a cause of action unknown to the common law."

These declarations by the appellate courts of Pennsylvania make it abundantly clear that the wrongful death statute created a new right or cause of action, and not merely a new remedy to enforce a right previously existing. Petitioner at pages 11 and 12 of her brief cites a passage from *Fisher v. Hill*, 368 Pa. 53, 58-60 (1951), as dispositive of the proposition that the "cause of action" is the negligent act. That case dealt with the simple procedural question of combining a wrongful death action with a survival action, and went no farther than to hold that the rights of action or claims arose from the same negligent act of the defendant and must be joined in bringing suit to avoid circuity of action. Petitioner's attempt to convert this language into an argument for applying admiralty principles to a state-created cause of action is an exercise in semantics which contradicts the conclusions of the Pennsylvania appellate courts.

CONCLUSION.

It is respectfully submitted that the petitioner is not entitled to a greater recovery than she has already received. Her wrongful death action is rooted in state law, and, since it is not remedial but a state created cause or right of action, it is subject to the common law contributory negligence rule. Any change in the law is the province of the state legislature.

Petitioner's rights were not enlarged by the decision of this court in *Pope & Talbot, Inc. v. Hawn, supra*, and to reach any other conclusion would repudiate the well-

established doctrine of *Erie R. Co. v. Tompkins*, *supra*, as extended to admiralty jurisdiction in *Western Fuel Co. v. Garcia* and *Garrett v. Moore-McCormack Co., Inc.*, *supra*. The petition should accordingly be dismissed.

Respectfully submitted,

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958.

No. 147.

IRENE HILL, Administratrix of the Estate of BENJAMIN HILL, Deceased,

Petitioner,

v.

WATERMAN STEAMSHIP CORPORATION,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

October Term, 1958. No. 147.

IRENE HILL, ADMINISTRATRIX OF THE ESTATE OF BENJAMIN HILL, DECEASED,
Petitioner,

v.

WATERMAN STEAMSHIP CORPORATION,
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

In attempting to support the contention that no conflict exists between the decision below and those of this court, respondent quotes language from *Garrett v. Moore-McCormack Company*, 317 U. S. 239, 245, 87 L. Ed. 239, 243, and *Western Fuel Co. v. Garcia*, 257 U. S. 233, 242, 66 L. Ed. 210, 214.

The Garrett case, following the principle of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, specified clearly that a state rule cannot affect or limit the substance of a maritime right or cause of action or, to otherwise express it, it may not act in derogation of rights arising upon the commission of a maritime tort. 317 U. S. at 243-4, 87 L. Ed. at 242-3. This court there declared "the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law." (U. S. at 244-5, L. Ed. at 243) Just as, in Garrett, the imposition upon a maritime right of a burden of proof prescribed by state law was held to affect the very substance

of the claim, so, here, would the injection of the state bar of contributory negligence deprive petitioner of the substance of her right which arose by reason of a maritime tort or default. This court said, in *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 409, 98 L. Ed. 143, 151, that *the right of recovery is for the unseaworthiness or negligence*, which are rooted in the federal maritime law. It is solely to this right that Garrett adverts, and not to the *remedy*, state-created or otherwise. The source from which the remedy is drawn merely defines it, but prescribes nothing as to its operation in the field to which it is transferred. When borrowed by the maritime law, it becomes a part of it. *The Arizona v. Anelich*, 298 U. S. 110, 119, 80 L. Ed. 1075, 1079. Thus, in the *J. E. Rumbell*, 148 U. S. 1, 37 L. Ed. 345, this court applied a *state* lien statute in a *maritime* cause of action, in a manner wholly incompatible with the *state* law, and solely according to *maritime* principles.

The situations cited by respondent involving death caused by a maritime tort, where the limitation period specified in the state death act was given effect[1] are inapplicable in the present situation. For, in such cases of "built-in" limitations, the power to sue at all is given for the specified period, and ceases to exist at the expiration of that time. The expressed condition included within the statute itself must be recognized in its application. The application of the state bar of contributory negligence in a maritime death action does not follow therefrom. The contributory negligence bar is not a part of the Pennsylvania death statute, nor does this rule of the common law, as enforced by Pennsylvania courts, have any special application to death actions.

Respondent admits that a clear conflict exists upon the important question here involved, between the First and Second and the Third Circuits. This conflict is, itself,

1. *Western Fuel Co. v. Garcia*, 257 U. S. 233, 66 L. Ed. 210; *The Harrisburg*, 119 U. S. 213, 30 L. Ed. 362.

proper and sufficient basis for the review requested by petitioner.

Of course, respondent joins the Third Circuit in disagreeing with the two other circuits, as to the meaning of the decisions of this court, and the source of the rights arising out of maritime negligence and unseaworthiness. Respondent argues that the *O'Leary*[2] and *Halecki*[3] decisions interpret Hawn in a manner not intended by this court; and that the right enforced in an action for wrongful death has a different source from that in a personal injury action. But, this court emphasized, in Hawn, that the right of recovery in a maritime cause is "for unseaworthiness and negligence (which) is rooted in federal maritime law." (346 U. S. at 408-9, 98 L. Ed. at 150-1.) This remains the source of the action, irrespective of how serious the result, and continues to be the sole measure of liability.

Further, this court has recognized that a provision for suit beyond death is a purely remedial concept, that of "survivorship of action". *Cox v. Roth*, 348 U. S. 207, 99 L. Ed. 260; *Just v. Chambers*, 312 U. S. 383, 85 L. Ed. 903.[4] Indeed, to state that in the cases in which this court has applied a state death statute, more than a state remedy was adopted, would ignore the declaration of this court in *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 383-4, 62 L. Ed. 1171, 1176, which made it clear that this court, in such cases, is only adopting a state-created *remedy* to enforce a *right sanctioned by the maritime law.* This is the power given to the court by the Judiciary Act of

2. *O'Leary v. U. S. Lines* (1 Cir.), 215 F. 2d 708 (cert. den. 348 U. S. 939, 99 L. Ed. 735).

3. *Halecki, Admx. v. United N. Y. & N. J. S. H. P. Assn.*, (2 Cir.) 251 F. 2d 708 (cert. granted, 6/9/58, U. S. 2 L. Ed. 2d 1154).

4. Similarly, as discussed *infra*, the Pennsylvania Constitution, Art. 3, Sec. 21, limits the authority of the Pennsylvania legislature to provide only for *survival* of right of action after death. Pa. Stat. Ann., Constitution.

1789, Sec. 9, and the Judicial Code, 28 U. S. C. A. 1333, which saves to suitors, only common law *remedies* for their application.

A clear conflict exists between the decisions of the court below and those of this court. Concededly, the court below is in categorical disagreement with the First and Second Circuits. This court has granted certiorari in the Halecki case, where the present issue is among those to be reviewed. In the interest of justice, certiorari should be granted in the instant case, so that judgment herein may be reversed in accordance with the law as expressed by this court.

Despite the fact that Pennsylvania has disavowed the creation of a new cause of action by its wrongful death act, the court below has nevertheless decided to the contrary. In attempting to justify this conclusion, respondent has cited some Pennsylvania decisions which demonstrate the point at which the court below strayed in its reasoning. Respondent, like the court below, has lost sight of the alert sounded by this court in *U. S. v. Memphis Cotton Oil Co.*, 288 U. S. 62, 67, where, after discussing the meanings variously impressed upon "cause of action", "right of action", and "remedy", Mr. Justice Cardozo emphasized the necessity for close scrutiny and differentiation to truly identify the aspect of the law in question, especially where such will have a material effect.

Many cases arise where labels are unimportant because misnomers will not substantially affect the result. As a consequence terms are sometimes applied inadvisedly. Respondent has cited a number of such cases concerning the Pennsylvania Wrongful Death Act. But, as discussed in the petition for certiorari, the Pennsylvania Supreme Court has also had to decide cases in which, as here, delineation of the meaning and effect of the Act had to be made, because identification of concept was necessary to reach a decision. There, the Court has consistently held that *the cause of action is the wrongful act or viola-*

tion of a duty, which existed at common law, and was not created or defined by the Pennsylvania statute; and that this statute provided merely for survival of this right to next of kin. Such are cases involving issues of multiplicity of action and res adjudicata,[5] release,[6] survival of action,[7] and conflict of laws,[8] where the differentiation among wrongful act, result and remedy were necessary to a decision.

These conclusions are in accord with the provision of the Constitution of Pennsylvania, Art. 3, Sec. 21, which provides, concerning death actions, only that "in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted."[9] This is purely a survival provision. It recognizes that a right existed without necessity of creation by Pennsylvania, and required only the mechanism of a remedy.

Indeed, *Howard v. Bell Telephone Co.*, 306 Pa. 518, 160 Atl. 613 (1932), cited by respondent, is an excellent example of the necessity for matching term with concept advisedly. There, decedent died twenty-one years after sustaining injury. The question was whether an action for wrongful death, timely after the demise, was barred because decedent had already been barred in his lifetime by the statute of limitation. As did the court below in *Curtis v. Garcia*, the Pennsylvania court made the preliminary statements that "there was no action at common law for . . . death" (p. 520), and that "the Act of 1851 created a new right of action" (p. 521). But, then, the court analyzed the concepts involved and confirmed that "the original right of action" was in the decedent, and the rights of the statutory beneficiaries are "but in succes-

5. *Fisher v. Hill*, 368 Pa. 53, 58, 81 A. (2d) 860 (1951).
6. *Hill v. P. R. R.*, 178 Pa. 223, 228, 230, 35 Atl. 997 (1896).
7. *Hughes v. D. & H. Canal Co.*, 176 Pa. 254, 260, 35 Atl. 190 (1896).
8. *Centojanti v. P. R. R.*, 244 Pa. 255, 261-2, 90 Atl. 558 (1914).
9. Pa. Stat. Ann., Constitution, Art. 3, Sec 21.

sion or substitution", (521-2),[10] that "it must be remembered that the cause of action contemplated by the statute is the tort, the 'unlawful violence or negligence', and not the death caused by the tort." Thus, it is obvious that in first speaking of "action" and "right of action" as cited by respondent, the court really meant "*remedy*", that the cause or right of action discussed in the death statute is the same that decedent had in his lifetime, and that the act provided but a remedy to next-of-kin by permitting the same right to survive the death.

Similarly, in the other cases cited by respondent, the issues involved did not require the court to differentiate between cause of action and remedy as terms of art. For instance, in cases of limitation of action, although the Pennsylvania statutes of limitation are held to be bars to the *remedy*, the courts have often inadvisedly referred to the limitation upon the right of action. For such purposes, as for most, the terminology made no material difference for, although the right might still exist, there being no means of enforcing it, the label became immaterial. The danger, however, is seen in the use made of such decisions. *Fisher v. Hill*, 368 Pa. 53, 58, 81 A. (2d) 860 (1951), highlights this, and demonstrates the inaccuracies in the prior *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. (2d) 659, 661 (1942), where the court used the term "cause of action" as meaning "remedy" or "power to sue", and not to identify the legal right. Such interchangeable use must periodically be corrected by the court where, as here, the terminology will significantly affect the determination.

Respondent attempts to minimize the meaning and effect of *Fisher v. Hill*.[11] We submit that this case and the others cited by petitioner have disposed of the question in

10. This is in accord with *Just v. Chambers*, 312 U. S. 383, 85 L. Ed. 903; *Cox v. Roth*, 348 U. S. 207, 99 L. Ed. 260.

11. No exception is taken, however, to the other decisions of the Pennsylvania Supreme Court cited by petitioner, which specifically pinpoint the problem and are in accord with Fisher v. Hill.

Pennsylvania, and bring it into line with the opinion of this court as expressed in *Pope & Talbot, Inc. v. Hawn.* Any other result would be in conflict with the Constitution of Pennsylvania, Art. 3, Sec. 21.

Respondent states that "petitioner recovered substantial damages" in the survival action, which were paid. The survival action verdict was $13,000, and the wrongful death verdict was $27,000, after both were decreased by the jury because of contributory negligence (App. below, 11a). This is in line with the fact that the real substance of a death action is the wrongful death claim, and not the survival claim. Thus, although petitioner did recover some damages herein, she was deprived of the substantial part of her losses by reason of the holding of the court below.

The basic principle which controls this matter is the paramount force and authority of the maritime law in all its aspects where it is properly invoked. The decision below limits this principle, in conflict with the decisions of this court and of two other circuits. This court has granted certiorari in one of the latter cases, where the present question is at issue. It is therefore respectfully submitted that a writ of certiorari should be granted, so that the decision of the court below may be reversed, in accordance with law.

Respectfully submitted,

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958.

No. 147.

IRENE HILL, Administratrix of the Estate of BENJAMIN HILL, Deceased,

Petitioner,

v.

WATERMAN STEAMSHIP CORPORATION,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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No. 147.

IRENE HILL, ADMINISTRATRIX OF THE ESTATE OF BENJAMIN HILL, DECEASED,

Petitioner,

v.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner, IRENE HILL, Administratrix of the Estate of Benjamin Hill, Deceased, respectfully prays that this Court grant rehearing of its order of March 2, 1959, denying the petition for writ of certiorari, — U. S. —,[1] and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in the above-entitled case, as prayed for in the petition filed herein on July 2, 1958.

1. Mr. Justice Douglas was of the opinion that certiorari should be granted.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. The Decision of the Court Below Is in Direct Conflict With United N. Y. & N. J. S. H. P. Assn. v. Halecki, Wherein This Court Affirmed the Second Circuit in Applying Comparative Negligence to a Longshoreman's Death Action.

In *United N. Y. & N. J. S. H. P. Assn. v. Halecki*, — U. S. —,[2] this Court considered the instant issue: whether, in a federal diversity suit for maritime tort, under a state wrongful death act (there, New Jersey), the suit is governed by the state common law rule of contributory negligence or by the maritime rule of comparative negligence. This Court affirmed the decision of the Second Circuit that comparative negligence applies. In the instant case, the opposite conclusion was reached by the Third Circuit, and, this Court, in denying the petition for certiorari, allowed that holding to stand, although it was in direct conflict with this Court's decision in *Halecki*.

In *Halecki*, the Second Circuit had held that, under the doctrine of this Court in *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, "rights arising from faults that occur in navigable waters are exclusively the creation of maritime law, and are exempt from the defense of contributory negligence, whether suit upon it is in the admiralty or in an action at law, state or federal" and that "to deny the exemption to the next of kin seems to us to the last degree capricious and irrational."[3] The Court specified that it agreed with the same holding by the First Circuit in *O'Leary v. United States Line Co.*, 215 F. 2d 708, 711, and disagreed with the Third Circuit in *Curtis v. Garcia*, 241 F. 2d 30, 36 (App. p. 17). It was the *Curtis* case upon which the Third Circuit

2. October Term, 1958, No. 56, decided February 24, 1959.
3. 251 F. 2d 708, 712-13.

based its decision in the instant case (App., p. 15). In affirming *Halecki* on this point, then, this Court in effect indicated its disagreement with the theory propounded by the Court below in *Curtis* and in the present case.

In view of the status of the cases, the present matter should be reviewed and the judgment below reversed, so that it may be brought into consonance with this Court's most recent decision in *Halecki* and effectively resolve the conflict among the circuits.

2. The Decision by the Court Below That the Pennsylvania Wrongful Death Act Created a New Cause of Action, and Not Just a Remedy, Conflicts With Decisions by the Supreme Court of Pennsylvania Upon That Specific Issue.

The decision of the Court below was based upon the conclusion that the Pennsylvania Wrongful Death Act created a *new cause of action*, rather than merely provided a *remedy*. This conclusion was in direct disagreement with the decisions of the Pennsylvania courts.

The Supreme Court of Pennsylvania, in *specifically* considering the question of just what the Pennsylvania Wrongful Death Act [4] provided, has consistently held that such statute presents only a *remedy* for a right existing elsewhere; *that the right of action for death is created by the negligent or wrongful act committed.*[5] The Pennsylvania court has held that "the cause of action is the wrongful act," and "right" or "cause" of action means the violation of the duty, and not the result thereof. *Fisher v. Hill*, 368 Pa. 53, 58-60, 81 A. 2d 860; *Simodejka v. Williams*, 360 Pa. 332, 62 A. 2d 17; *Fields v. Philadelphia Rapid Transit Co.*, 373 Pa. 282, 285, 117 Atl. 59; *Centofanti v. P. R. R.*, 244 Pa.

4. 12 Pa. Stat. Ann. 1601-4.

5. This is in agreement with the conclusion of this Court in *Pope & Talbot, Inc. v. Hawn*, 346 U. S. at 409, that the "right of recovery" is "for unseaworthiness and negligence" and not for the injury or death.

255, 261-2, 90 Atl. 558; *Hill v. P. R. R.*, 178 Pa. 223, 35 Atl. 997.

In the *Fisher* case (368 Pa. at 58), the Pennsylvania court alerted us to the danger of using the terms inadvisedly, quoting the special warning voiced by this Court in *U. S. v. Memphis Cotton Oil Co.*, 288 U. S. 62, 67, concerning the very terms at issue here. Disregard of this warning has caused many courts to lose sight of the important distinctions emphasized in *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 383-4.

In holding then, that the right of action here is "rooted in" state law, the court below misapplied language to meaning, and decided Pennsylvania law in complete disagreement with the Supreme Court of Pennsylvania, where that Court has considered the specific point in question. In so doing, the court below impressed upon the maritime tort a measure of liability foreign to maritime law *and* unintended by the state law. This was clearly erroneous. *The Vessel M/V Tungus v. Skovgaard*, — U. S. —;[6] *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 408-9.

In the *Tungus* case, this Court, discussing the New Jersey death statute, pointed out that New Jersey courts have not spoken upon the question whether, in a case such as this, maritime law or common law is applicable under the statute. Thus, the Court of Appeals was permitted to make its own interpretation, and applied the full effect of the federal maritime law, which it found the statute had incorporated.

The basis upon which this Court looked to New Jersey law in the first place was the conclusion that New Jersey had created the original right itself, as opposed to the remedy. But, such is definitely not the case with the Pennsylvania law. Here, the court below decided this important state question in conflict with the applicable state decisions and was thus led to a serious departure from the federal maritime law.

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6. October Term, 1958, No. 43, decided February 24, 1959.

3. There Is Presently Pending Before This Court Another Case Involving the Same Issue as Herein.

On March 2, 1959, this Court granted certiorari in *Goett v. Union Carbide Corporation*, October Term, 1958, No. 307. In that case, as here, a maritime worker was killed aboard a vessel within the navigable waters of a state. The Court of Appeals for the Fourth Circuit held that the right to recover for the death can be enforced only in accordance with the substantive law of the state. In petition for writ of certiorari filed therein, one of the questions presented was whether the right to recover for death occurring on navigable waters of a state is limited by a common law defense (assumption of risk) under the state substantive law, or whether this is governed by the federal maritime law.

The *Halecki* case, *supra*, involved this issue also. But, it was apparently decided by this Court upon its special facts and the general issue left undecided, so that certiorari was granted in the *Goett* case. The same general issue is involved in the instant case.

In comparable situations this Court has consistently confirmed the supremacy of the federal maritime law where it conflicts with a state provision. Even where a state-created *right* is applied in a maritime cause, the right has been enforced according to maritime principles although they are in direct conflict with state law. *The J. E. Rumbell*, 148 U. S. 1, 12, 17. See also *Union Fish Co. v. Erickson*, 248 U. S. 308, 314. *There is no reason why the requirement for uniformity should be subjected to an exception in the case of a maritime tort.*

Your petitioner earnestly submits that the instant case should be presented to this Court and reviewed together with the *Goett* case, so that all viewpoints upon this important question may be presented.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari be issued to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58 of this Court.

MARTIN J. VIGDERMAN,
Counsel for Petitioner.